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Dr. C. P. RAMASWAMY AIYAR

A TRIBUTE.

It is easy to speak or write about Sachivothama Dr. C. P. Ramaswamy Aiyar. Indeed, who cannot or would not effuse over such a distinguished and fascinating personality ? The difficulty is to restrain oneself from using too many superlatives. Strikingly handsome in appearance, invariably carrying himself with an aristocratic *aplomb*, widely read in English, French and Samskrit, exceedingly well informed on any and every subject, lively and sparkling in conversation; a superb lawyer, a finished orator, a virile and combative politician, a versatile diplomat, an able and efficient administrator, an engaging unofficial ambassador in foreign countries representing the best in Indian Tradition and Culture. His life and career as student, lawyer, Advocate-General, Law and Commerce Member, Dewan of a State, Representative of India, Vice-Chancellor of Universities and peripatetic lecturer is an inspiring object-lesson in what ability, intelligence and industry combined with *Bon homie* and *Joie de vivre* can do for a man. And what a man !

> " . . . . the elements
> So mix'd in him, that Nature might stand up
> And say to all the world, *This is a man* ".

He flashed across the legal firmament in Madras like a brilliant meteor with an almost ethereal effulgence ; a prime favourite of the Gods and succeeding generations of Judges and litigants. His phenomenal success at the Bar after a hectic period of office in the

administration of his Province was but one of the several dramatic episodes in his long, varied and eventful life. His great devotion to his revered father, his loyalty and attachment to some friends of his early days are touching qualities in him. We who have known him and been privileged to work with him at the Bar are proud to have enjoyed his patronage, his friendship and his princely hospitality. He has contributed munificently to several charities and Educational and Social Institutions. If certain persons can be said to have been born with silver spoons in their mouths, it can be truly said of C. P. that he was born with a golden spoon in his mouth and, what is more, that he continues to have it still in his mouth after all these eighty years. May he live long for many, many more years and continue to flourish in all his greatness and glory—a gifted and gracious exponent of the art, technique and æsthetics of Life, Law and Literature.

R. N. AINGAR,

T. V. VISWANATHA AIYAR.

ROLE OF PARLIAMENT IN PROTECTING RIGHTS OF INDIVIDUAL.*

MR. CHAIRMAN AND FELLOW-DELEGATES,

May I, at the outset, offer our sincere thanks to the Polish Parliamentary Group and their Government for the warm and traditional hospitality extended to us, delegates?

We are grateful also to the Secretary-General who has presented us a report which has involved some labour. The note on the " Role of Parliament in protecting the rights of the individual ", though brief, contains most of the matters pertinent to this issue. The Resolution before us believes in the ability of Parliament to strike a balance between individual rights and the maintenance of public order; realises that ultimate safeguarding of Parliamentary Democracy lies in the interest aroused in the individual voter and, finally, believes also in the separation of the Judiciary from the Executive and Legislature to ensure freedom from bureaucratic interference.

My esteemed friend, Lord Birdwood of Great Britain, has, in his note and statement, elucidated the various aspects of individual freedom, mainly in the context of the British system. However, an important aspect has not been sufficiently stressed and that is the paramount need in all democracies for an independent Judiciary. This is a *sine qua non* for the protection of individual rights. Historically speaking, the British example is unique, where there is no written Constitution as such, and where the Parliament is supreme. In the 17th century the *Habeas Corpus Act* of 1679 culminated in the *Bill of Rights* in 1689, wherein the English Parliament protected the rights of the individual. With the evolution of its supremacy and the Cabinet form of Government responsible to it, the Parliament in England has always played a leading role in safeguarding people's liberties.

In the United States of America, there was the *Bill of Rights* which took definite shape by 1791. The role of Parliament there, is not similar to that of Britain, but the bi-party system vouchsafes effective protection of the rights of the individual. The " Separation of Powers " was scrupulously adopted in that great country and the role of the Supreme Court there has been significant and far-reaching.

In France, we had the *Declaration of the Rights of Man* in 1789, and these have been accepted by all the French Constitutions, including the latest of the Fifth Republic. The French have always been traditionally sympathetic to the problem of individual liberty and, through interpellations in Parliament, arbitrary action of Government has been effectively curbed.

In India, which is one of the biggest Democracies represented here today, we have a written Constitution. Part III of our Constitution proclaims and enumerates the Fundamental Rights of the Indian citizen and, in some cases, of even persons who are not citizens. The Articles in this Chapter cannot be modified like those of the other portions of the Constitution and require special majorities for the constitutional amendments. The rights fall into certain categories, *viz.*, the Right to equality, the Right to freedom, the Right against exploitation, the Right to freedom of religion, cultural and educational rights, the Right to property and the Right to constitutional remedies.

In the well-known "Cross Roads cases" (*Romesh Thapper* v. *State of Madras*)[1], in which I had the good fortune of appearing for the petitioner, the Supreme Court of India, speaking through the Hon'ble Justice Patanjali Sastri, declared that the right to move the Supreme Court through a writ was itself a fundamental right.

* Speech delivered by Sri C. R. Pattabhi Raman, Barrister-at-law, M. P. (India) at Inter-Parliamentary Conference—Sejm—(Parliament) Warsaw, on 2nd September, 1959.

1. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390.

The fundamental rights are : equality before the Law and equal protection to all citizens ; prohibition of discrimination on grounds of race, religion, sex, caste, etc.; freedom of speech and expression ; freedom of assembly and association ; freedom to acquire and dispose of property; freedom from arbitrary arrest and detention ; and freedom of conscience. Any State or Union Law, which abridged or impinged upon the guaranteed rights, could be struck down by the Courts of our land. There are, of course, certain reasonable restrictions on the rights enumerated above in the larger interest of the general public. The Parliament may enact laws in certain cases of preventive detention and the Legislatures of our States may enact laws in relation to acquisition of property for public purposes. Under Article 265 of our Constitution, it is laid down that "no tax shall be levied or collected except by the authority of law". The Executive cannot, therefore, act in an arbitrary fashion and must act under authority of law enacted by Parliament. We have provision for Presidential Ordinances during the intersession period of our Parliament, but these have to be placed before the House as soon as it meets.

Following the British practice, the Legislatures in India have devised various procedures by which they can keep a close watch over the Executive and fulfil their role of guardians of the people. We have the Question-Hour, Half-hour discussions and Adjournment motions, through which Members of Parliament keep the Ministers of our Government on tenterhooks, as it were. The Members have full privileges to ventilate their grievances on the floor of the House. They, and any member of the public, can also submit petitions to the Legislature, pointing out grievances and seeking remedies. There are in addition, various Parliamentary Committees, like those on Petitions, on Government assurances and subordinate legislation, guarding people's liberties and attending to their petitions. We have, during the annual budget session, many opportunities to express our view-points and to seek redress. The Parliament can refuse to vote a Demand for Grant of any Ministry and, finally, there are the Estimates and Public Accounts Committees of our Parliament to check unwarranted or extravagant expenditure by the Ministries. The Parliament in India has therefore a significant role to play in the protection of the individual's rights, and its procedures have been so framed as to enable it to fulfil its role effectively.

Parliamentary Democracy depends on each and every citizen who must vigilantly exercise his rights. It is the citizen's freedom to criticise the ruling Government, to publicise his criticism and to seek peacefully to effect a change therein that may be called the corner-stones of the democratic edifice. I consider this item on our Agenda to be the most important one. There must be a "*Dharma*", to use an ancient Indian word, fundamental in character, solemnly declaring and recognising the rights of an individual. However, as pointed out by the note before us, there has also to be an equitable balance between individual rights and public order. We, in India, cannot be slow in catching up with the advanced countries of the world. Parliaments have to pay due regard to public welfare and at the same time to see to it that the rights of the individual are respected.

I conclude by repeating that there must be a well-understood "Separation of Powers" and, without an independent Judiciary, the guaranteed rights would become farcical. It is necessary to have a well-defined Constitution and certain fundamental rights guranteed to the citizens, which cannot, in the usual course, be abridged by Parliament. To ensure obedience of the legislatures to these guaranteed rights, we must have an independent Judiciary. The Judges of that limb of the State should be appointed on their merits and should not be removed ordinarily by the Government and, in rare cases of misconduct, etc., there must be a special procedure for their replacement.

I thank you all fellow-delegates for the patience with which you have listened to me.

BOOK REVIEWS.

THE PREVENTION OF FOOD ADULTERATION ACT, by *Rai Sahib Jainti Prasad Gupta*, Advocate. Published by the Hindustan Law Publishing Company, Meerut —Second edition, 1959 : Price Rs. 7.00 nP.

That a second edition, of the Author's Commentaries on the Prevention of Food Adulteration Act has been brought out within just two years of the first edition is proof positive of its popularity and usefulness. The Commentaries are clear, analytical and exhaustive and the text of the Act and the Rules are given as amended up to date. We are sure the present edition will prove as useful and popular as the previous one.

SPECIFIC RELIEF ACT, by *K. N. Bhaumik*, B.L., Published by Eastern Law House (Private) Ltd., Calcutta 13 : Price Rs. 10.

The law relating to Specific Relief, though codified in the Specific Relief Act, is essentially a Judge-made law. The remedy of specific relief is an equitable remedy and the Courts have a great amplitude of discretion in granting or refusing it. There are several classic works on this subject by eminent writers and the Indian Act has also been the subject of several commentaries.

This well got-up handy commentary under review is a useful addition to the existing literature on the subject. The notes under each section are clear and well documented with case law—Indian and English. References are also made wherever necessary to standard treatises like Fry on Specific Performance. We have no hesitation in commending the book to students of law and practitioners.

INDIAN LIMITATION ACT, by *H. C. Mitra.* Fourteenth edition by B. B. Mitra, B.A., LL.B., Bar-at-law, Advocate, *Supreme Court of India.* Published by Eastern Law House (Private) Ltd., Calcutta 13 : Price Rs. 18.

No other branch of law has created problems to the Bench and the Bar to resolve than the law relating to limitation. A question of limitation cannot be said to fall clearly either under substantive or procedural law and the Courts permit question of limitation, unlike other procedural aspects, to be raised at any stage. The provisions of the Act and its elaborate Articles have been the subject of judicial interpretation for several decades now.

Sri Mitra's Commentaries on the Limitation Act has become a standard work in the field and has been accepted as a reliable and useful book by the Bench and the Bar. Like the illustrious Tagore Law Lectures on Limitation by U. N. Mitra, the present commentary is known by the familiar name of Mitra's Limitation to successive generations of lawyers. We are sure the present edition, appearing as it does after a lapse of several years, will be welcomed by the Profession as a long awaited book.

DIGEST OF STATUTES—CENTRAL AND KERALA—VOLUME 1—CENTRAL STATUTES, by *Joseph M. Madathil*, Advocate, Ernakulam (1959). Published by Kerala Law Times, Ernakulam, Kerala State : Price Rs. 15.

In these days of frequent and voluminous legislation no apology is needed for publishing a book of the kind under review. The publication of a digest of all the Central and State Legislations is bound to be of immense use to legal practitioners in the State who have to face and deal with the kaleidoscopic changes in the law in their daily avocation. The first volume containing the Central Acts is self-contained and will be found useful to practitioners all over the country.

It is not pretended by the publishers that the Digest under review provides all that a lawyer would need. It is more in the form of a referencer or index leading to the original sources for further information. The Statutes are arranged in the alphabetical order and the legislative progress of each of the Act is indicated by giving the several amending or repealing Acts with the references to the rules and notifications thereunder. A perusal of the volume shows the indexing to be exhaustive and accurate and we are sure the publication will be found useful by all sections of the profession and the public.

IDENTIFICATION OF THUMB IMPRESSIONS AND CROSS-EXAMINATION OF FINGER-PRINT EXPERTS, by *M. K. Metha*, Examiner of Questioned Documents, Delhi. Price Rs. 12.

In this small booklet of about a hundred pages the Author has given an introductory study of the vast subject of Finger-prints and Cross-examination of Experts. The first eight chapters covering about sixty pages is devoted to the explanation of thumb or finger impressions, the characteristic lines and moulds, their identifications and comparisons and the examination and cross-examination of the expert. The rest of the pages are devoted to illustrative cases before some of the up-country subordinate Courts. As an elementary guide to the subject the book will be found useful to lawyers and examiners of questioned documents.

LAW OF MOTOR VEHICLES IN INDIA, by *Kashikanta Maitra*, Advocate, Calcutta. Published by Parichay Publishers, Calcutta 9. 1959 Edn. Price Rs. 12.

The provisions of the Motor Vehicles Act, 1939 and the rules framed under it have come for frequent interpretation before the Courts in recent years. With the development of road transport and the increased competition for route permits the provisions of the Act and the Orders of the Transport Authorities have been challenged before the High Courts and the Supreme Court. The recent amendments effected by Act C of 1956 and the creation of State Transport Appellate Tribunals have only increased the numbers of applications in the Courts.

The publication under review is a commentary on the Motor Vehicles Act and being latest in the field will find a ready reception among lawyers and carriage operators. With a little more attention devoted to the editing and indexing we feel the book would have served its purpose better.

ARCHBOLD'S PLEADING, EVIDENCE AND PRACTICE CRIMINAL CASES, 24th Edition (1959). Published by Sweet and Maxell, Ltd., Chancery Lane, London W. C. 2., Agents in India N. M. Tripathi (Private) Ltd., Princess Street, Bombay 2.

It is needless to introduce to the Legal Profession this classic work popularly known by the Author's name alone. Archbold's Criminal Pleadings, though it deals with the English Law, has become an indispensible book of reference to the practitioners on the criminal side and to the students of Criminal Law and Procedure in India as well. Essentially a book on the procedural law, the book also deals with several aspects, of the substantive law as well. The present edition incorporates the recent statutory provisions in England as well as the decisions up to date. Without losing its utility and value it has been printed and edited in a way which makes it more useful as a practitioner's book. The elaborate Table of cases and Index and the Publisher's system of supplying the periodical Noter-up and Cumulative supplement will enhance the utility of the book to the Practitioners.

LAW AND CUSTOM OF THE SEA, by *H. A. Smith*, D.C.L., (Lond.) Stevens & Sons, Ltd., 1959, Third edn. N. M. Tripathi (Private) Ltd., Bombay. Price 21sh.

Prof. Smith's Law and Custom of the Sea is an admirable hand-book to the men of the Navy. It explains in simple language the rights and duties and obligations and liberties of sea-going officers whether in charge of battleships or merchants' vessels. The book is divided into two parts in war and in peace. The importance of this branch of the law cannot be over-emphasised as the sea covers a larger part of the world than land and with the advancement of trade and development of technical knowledge the activities of men on the seas has become as familiar and necessary as their activities on land. In the background of the two World Wars the problem of Territorial waters, High Seas, War at sea, Blockade, Capture, etc. have gained great significance in International law. As a guide to this vast and ever-growing branch of the law the book under review will be welcomed by lawyers, service-men and politicians alike.

NATURE OF CHANGES INTRODUCED BY HINDU SUCCESSION ACT, 1956, IN THE LAW OF INHERITANCE OF WOMEN

By

S. VAIDYANATHAN, *Advocate, Madras.*

The enactment of the Hindu Succession Act, 1956, is a landmark in the evolution of the Hindu Law of Inheritance. To appreciate the nature and extent of the changes made by the Act with regard to women, it will be useful to state in broad outline the general features of the antecedent law on the subject.

2. Before the enactment of Central Act II of 1929, in all the jurisdictions governed by the Mitakshara, other than the Provinces of Madras and Bombay, no female except the wife, daughter, mother, father's mother, paternal grand-father's mother and the wives of the paternal ancestors upto the seventh degree[1] had any rights to inherit the separate property of a Hindu male. Thus even such near relations of a Hindu male as his son's daughter, daughter's daughter and sister had no heritable rights. In Bombay and Madras, however, a more liberal view had prevailed on the subject, the law in Bombay being more progressive than that in Madras in recognising the widows of all gothraja sapindas upto the seventh degree including those of descendants and collaterals as entitled to inherit in preference to male gothrajas in a remoter line. Both in Bombay and Madras, daughters born in the family of descendants, ascendants and collaterals within five degrees were recognised as heirs, being Bandhus. The sister, however, occupied a higher place in the Bombay scheme of succession than the one assignable to her as a female Bandhu. Central Act II of 1929, however, altered the order of succession in all the provinces subject to the authority of the Mitakshara by enabling the son's daughter, daughter's daughter, sister and sister's son to inherit the separate property of a Hindu male dying intestate in the order stated above next after the father's father and before the father's brother. Under the Dayabagha law no female other than the widow, daughter, mother, father's mother and paternal grand-father's mother had any heritable rights in a Hindu male's property be it his separate property or an interest in joint family properties. Central Act II of 1929 did not apply to Hindus governed by the Dayabagha. The Hindu Women's Rights to Property Act, 1937, conferred a right on the Hindu widow to succeed to her husband's property along with his son, grandson or great-grandson. Similarly the Act conferred rights of inheritance on the widowed daughter-in-law and the widow of a predeceased grandson in the same manner as a son or grandson as the case may be. These rights are available to the women referred to above in both the Mitakshara and Dayabagha systems. Further, under the Act the interest of a Hindu male governed by the Mitakshara in joint family properties devolved on his widow at his death on the theory that she was his surviving persona. Both before and after the enactment of this Act, all women except in the Province of Bombay, could only hold a Hindu woman's estate in properties inherited by them. In the Bombay Province daughters born in the family such as the male owner's daughter, his sister and the other female heirs of his recognised as such in that Province, took the inheritance absolutely and not for the limited Hindu woman's estate.

3. So far, we have dealt with the heritable rights of women in the property of a male. As regards 'Stridhana' or the property of a woman, the position was more complicated. The rules governing succession to Stridhana were neither simple nor uniform. In order to determine the heir-at-law of a Hindu woman a number of factors had to be taken into consideration, such as the school of law to which she was subject, her status at the time of her death, whether she was a maiden, a married woman or a widow, the form of her marriage and the character of the property held by her. It may be stated generally, though the statement is too

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1. Mitakshara II V. 5 and *Jogadamba Koer* v. *Secretary of State*, (1889) 16 Cal. 367 at 373.

broad to be strictly accurate, that females and the female line were preferred to males and the male line in succession to Stridhana. In properties inherited by women as the heirs of women they had only the qualified estate known as the Hindu women's estate, except in the Province of Bombay where they took absolutely. Apart from the Mitakshara and Dayabagha rules of inheritance, there were in vogue in Malabar and Canara the Marumakkatayam and Aliyasantana systems of inheritance based not on the Sanskrit commentaries and Digests but on custom as modified by recent local legislation. Having regard to the matriarchal pattern of society prevalent in these areas it may be stated broadly that under these systems the rights of women in regard to inheritance were in some respects superior to those of women elsewhere. One important feature of these systems has to be specially noted. The Hindu woman's estate so familiar in the Mitakshara and Dayabagha law is unknown to and not recognised by the Marumakkatayam and Aliyasantana laws.

4. We now proceed to examine the features of the Hindu Succession Act to assess the range and sweep of the changes effected by the said Act with regard to the rights of women in the matter of inheritance. The position of the widow, who, prior to 1937 could only inherit her husband's estate in the absence of his son, grandson or great-grandson and who after 1937 took along with these lineal descendants the same share as a son, though for a Hindu woman's estate, has undergone important changes under the 1956 Act. In some respects her rights have been enlarged, though in some respects her rights have been curtailed. In the Mitakshara jurisdictions she now inherits jointly with the relations specified in Class I of the Schedule to the 1956 Act not only the separate properties of her husband but also the share to which he was entitled in the properties of the joint family of which he was a member at his death. Thus her position is assimilated to that of the Dayabagha widow. The Hindu Women's Rights to Property Act, 1937, has been repealed by section 31 of the Hindu Succession Act, 1956. It is therefore now no longer possible for the Mitakshara widow to have in the property held by her husband in coparcenary the same interest as he had at the time of his death. But as stated already, for all practical purposes this does not by itself affect her rights to her prejudice. But, whereas under the 1937 Act the widow inherited her husband's estate jointly and along with only his three male lineal descendants or with the widows of the said lineal descendants who had predeceased him, now after the 1956 Act she has to share the inheritance not only with the abovementioned persons but with several others, such as the mother, daughter and the other relations specified in Class I of the Schedule to the Act, if they happen to be alive at the time the inheritance opens. It has been pointed out[2] that it is quite possible for all the eleven other relations mentioned in Class I to be alive to share in the inheritance jointly with the widow, thereby reducing her share considerably. This is the inevitable consequence of the principle of simultaneous succession enunciated in section 9 of the Act. One other important change made in the general Hindu Law with regard to the widow's right of inheritance may be noted. Chastity on her part was, under that law, a condition precedent to her right to inherit her husband's estate. There is a conflict of judicial opinion on the question whether this requirement as to chastity has been abrogated after the enactment of the Hindu Women's Rights to Property Act, 1937. A reading of the Hindu Succession Act as a whole in the light of section 28 thereof appears to imply that unchastity in a woman is as such not a disqualification for the purpose of heritable capacity. Even under the general Hindu Law, the rule as to chastity being a condition precedent for inheritance was confined only to the wife and not to other female heirs. Before leaving the topic of the widow's rights under the latest Act, it has to be observed that the Act does not depart from the rule enacted in the 1937 Act that if the deceased had left more widows than one, all of them together take a share equal to that of a son. *Vide* section 9, rule 1 of section 10 of the 1956 Act.

2. *See* the Article on "The Hindu Succession Act" by Prof. S. Venkataraman in (1956) 2 M.L.J. 60 at page 63 (Journal).

5. Next, we shall deal with the daughter's rights under the latest Act. The Act has effected a far-reaching improvement in her position as regards her father's estate. Under the prior law she acquired on his death—of course she had none during his lifetime—no interest in his coparcenary property. Even in respect of his separate property she came in as an heir, only in default of sons, grandsons and great-grandsons and widow. As between the daughters themselves under the Mitakshara a maiden excluded a married daughter. As between married daughters, the one that was indigent was preferred to the one that was wealthy. Similarly the Dayabagha had its own special rules of preference and exclusion of daughters *inter se*, on grounds of maidenhood, married status and their being barren or having male issue. All these rules of preference and exclusion peculiar to the Mitakshara and Dayabagha have been swept away by the 1956 Act. It confers on the daughter a right to inherit both the separate property and the undivided coparcenary interest of her father along with the other heirs specified in List I of the Schedule to the Act. Each daughter if there are more than one takes in her own right her share and not together jointly as in the case of widow. There is no discrimination or preference as between daughters on any of the grounds detailed above. Thus the daughter has gained substantial advantages under the Act. The Act further confers on her surviving children if she happens to predecease her father, the right to represent her and take the share she would have taken if alive at her father's death. Thus, the position of the predeceased daughter is equated to that of the predeceased son and the children of both can represent and take the share of their respective parents at the time the inheritance opens.

6. The widowed daughter-in-law and the widow of the predeceased grandson of a Hindu male who obtained their rights of inheritance under the 1937 Act, figure also as heirs in the list of simultaneous heirs specified in Class I of the Schedule to the 1956 Act.

7. The position of the mother under the Act may now be examined. Under the general Hindu Law, she had only rights of maintenance in the coparcenary property of her son. Even in respect of his separate estate, she came in only as a late heir, taking only in default of the heirs upto and inclusive of the daughter's son. According to the Mitakshara the mother comes before the father in the line of heirs. Under the Mayukha and Dayabagha, the mother is postponed to the father. Under the Act of 1956, the mother succeeds both to her son's separate estate and coparcenary interest, as a simultaneous heir along with the relations mentioned in Class I of the Schedule. The father, it is interesting to note, is not in this class but relegated as the first heir in Class II and he can therefore inherit his son's separate property only in default of all the relations in Class I.

8. Of the three women on whom heritable rights were conferred by Central Act II of 1929, in the Mitakshara provinces, *viz*., the son's daughter, the daughter's daughter and sister, the first mentioned two will now inherit in all the jurisdictions as Class I heirs. The sister about whose exact place in the line of heirs in Bombay Province there has been some unresolved controversy after the enactment of the 1929 Act, is now placed in Class II of the Schedule to the 1956 Act and can therefore inherit her brother's separate property only in default of the relations in Class I and the father. She has to share the inheritance, however, with the son's daughter's son, son's daughter's daughter and brother, if these relations are alive at the date the succession opens.

9. Besides the female heirs referred to and considered above the daughter's son's daughter, daughter's daughter's daughter, the father's mother, step-mother, brother's widow, father's sister, mother's mother and mother's sister are the only other women who are specifically referred to as heirs to the separate property of a deceased male and all of them appear in Clause II.

10. Central Act II of 1929 stands repealed by section 31 of the Hindu Succession Act of 1956.

11. Besides the female relations expressly mentioned in Class I and Class II of the Schedule to the 1956 Act, it would appear that women can now inherit a man's separate property as either agnates or cognates as the case may be in default of all the heirs in Classes I and II by virtue of section 9 read with section 12 of the Act, sex as such being no ground of disqualification under the Act. So far we have dealt with the rights of women to inherit a man's property.

12. As regards succession to a woman's property, the law has been simplified in a remarkable manner. Section 14 of the Act of 1956 enacts the most radical and revolutionary of the changes introduced by the Act by declaring that all property "possessed" by a female Hindu whether acquired before or after the commencement of the Act shall be held by her as full owner thereof and not as a limited owner. "Property" is defined in the *Explanation* to the section in the most comprehensive language as including every species of property howsoever acquired by a Hindu woman. The only exception which, on examination, will be found to be not an exception at all in the real sense, is property acquired by a woman under a grant, gift, will, decree or award with an express restriction as to the duration of the estate. It is needless to point out that even if a property was held by a Hindu male under similar circumstances, his ownership therein will be qualified by the restrictions imposed by the grant, gift, will, decree or award as the case may be. Reverting to section 14, it abolishes in one stroke for the whole of Hindu India the Hindu Woman's Estate. The word "possessed" occurring in sub-section (1) of section 14, has given rise to some interesting and practical problems and the Courts are gradually clearing up the ambiguity by the process of judicial interpretation There is some slight conflict of judicial opinion on the point, but the better opinion appears to be that the right conferred by section 14 on a Hindu woman is one purely personal to her and the section should not be so construed as to confer on pre-1956 alienee from the holder of a Hindu woman's estate the benefit of the enlargement of the limited estate into an absolute one.

13. The rules of succession in regard to a woman's property are laid down in section 15 of the Act and these supersede the elaborate and complicated rules under the general Hindu law. The principal feature of the new rules is that the son is allowed to take his mother's estate along with her daughter and can no longer be excluded by her. This is in line with the corresponding right given to a daughter to share her father's property with her brother. Parallel with the right given to a widow to share the estate of her husband with his son and daughter as a simultaneous heir, the husband is made to inherit his wife's estate simultaneously with the son and daughter. Thus, the husband, son and daughter inherit jointly and simultaneously a woman's property as her first heirs, each taking an equal share. Section 16 provides for the children of a son or daughter who had predeceased the female propositus to represent their respective parents in sharing the inheritance of the said propositus. In the absence of son, daughter, and husband, the property of a woman goes first to her husband's heirs, and in their default to her parents, and thereafter to her father's heirs and finally to her mother's heirs. The rule is, however, subject to an important qualification and it is this : If the property of a woman to which succession is claimed had been inherited by her from her parents, it is provided by section 15 (2) (*a*) of the Act that it shall devolve in default of her children not upon the other heirs specified in sub-section (1) of the section, but upon her father's heirs. Likewise the property inherited by a woman from her husband devolves in default of her children only on the heirs of her husband to the exclusion of the other heirs mentioned in sub-section (1). *Vide* section 15 (2) (*b*) of the Act.

14. This survey of the changes made in the inheritance rights of women by the latest legislation of 1956 would be incomplete without a reference to the provisions of sections 7 and 17 of the Act whereby the rules of inheritance under the Marumakkatayam and Aliyasantana laws are superseded by the rules laid down by the Act subject, however, to a few minor modifications which do not materially affect the general principles of the Act.

"HINDU DIVORCE LAW—ITS HISTORY"*

MRS. RAJKUMARI AGARWALA, M.A., LL.M., (YALE),
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In spite of India's long contact with foreigners, Hindu life in its intimate and personal spheres was left untouched by notions of foreign law for a considerable time. Hindu law in marriage, adoption and inheritance was administered according to Shastric texts and recognised customs and usages in the country. Neither under Muslim rule nor during British regime were these issues ever moulded or controlled according to foreign legal ideology. The reasons might have been political or otherwise but the fact remains that preservation of the personal law of Hindus was the determined policy of both Muslim and British Rulers.[1]

Due to lack of detailed historical documentation of the whole of Muslim period it is difficult to find substantial evidence to support the above statement; nevertheless it can be undoubtedly said that the personal laws of Hindus were not altered by Muslim Monarchs. The changes made in Hindu law by Muslim Rulers were in the field of land law and criminal law. These were drafted according to principles of Muslim Jurisprudence. During British rule since the establishment of Crown Courts in India the same policy was followed. As early as 1753 suits among "natives" were excluded from the jurisdiction of the Mayors' Courts—the first Crown Courts in India. The Charter Act of 1781 provided that in the Supreme Courts 'all matters arising out of inheritance and succession to lands and goods and all matters of contract and dealing between party and party shall be determined, in the case of Mohamedans by the laws and usages of Mohamedans and in the case of Gentoos by the laws and usages of Gentoos.' The Diwani Adalats since their establishment were directed to decide all cases of inheritance, marriage, caste and other religious usages and institutions according to the 'laws of the Shastra; with respect to the Hindus. The High Courts created by Charter Act of 1861 were also directed to follow the same civil law as was followed and applied by the Supreme Courts and the Sadar Diwani Adalat. Thus the High Courts also decided disputes of natives according to their personal laws and customs.[2]

Simultaneously with the establishment of High Courts is seen the emergence of the era of codification. After the establishment of the first Indian Legislative Council in 1830 began this era of codification and legislative reforms. Hindu Law of contracts was totally superseded in 1872. A chain of legislative enactments commencing in 1850 brought about considerable changes in Hindu Law of inheritance. But the Hindu law of marriage and adoption was not affected even in this sweeping period of legislative reforms.

Therefore, to analyse the legal concept of Hindu marital relations we have to begin with Vedic and Shastric texts and the customs and usages of Hindus as interpreted by judicial authorities from time to time. An attempt is made here to trace briefly the process by which divorce was introduced in Hindu law as a remedy for ills arising out of unsatisfactory marital unions.

Divorce as a remedy for matrimonial ills appears to us as something alien, and even to-day after our law-makers have engrafted it upon our legal code the term jars upon our ears, for it has been generally unknown to our socio-legal ideology. To begin with it was sporadically introduced in certain States and then extended in 1954[3] and 1955[4] so as to be applicable to the entire community.

The present-day law of divorce is the result of various environmental factors, social, political and economic. For hundreds of years we have lived and rubbed shoulders with a foreign culture group and as a natural consequence our people have absorbed some of their ideas of social existence. The cry for emancipation of the individual raised in the West has not failed to reach our ears. It is reflected in the recently enacted laws of our land. Hindu community with its roots deep in ancient Aryan culture has with the rest of the world gone through the upheaval

1. Rankin.
2. (1880-81) I.L.R. 5 Bom. 154, 173.
3. Special Marriage Act, 1954.
4. Hindu Marriage Act, 1955.

of two world wars and is now facing the greatest battle of modern age in the Industrial revolution. The Benthamite slogan of *lassiez faire*, wartime emergencies with their concomitant hardships and the change from an agricultural to an industrial structure of life all tend in one direction, *viz.*, the breaking up of the closely-knit family unit. The well-known formulae of individual endurance and personal sacrifice for the sake of the group, *i.e.*, the home, family or clan seem to lose their significance and become almost inaudible in the uproar and the drum-beating of the doctrine of individual freedom. Our normal standards of decency and refinement around the hearth and home, about morality and culture are apt to be distorted in the cold and cruel atmosphere of a wartime economy and its emergencies. The individual has no time to plan and lead a life in accord with his ordinary notions of propriety and rectitude. He just eats, sleeps and destroys others to preserve himself. The poet in him turns into the soldier of the battle-field. Industrialisation means rapid movement and mobility in every sphere of life. Quick changes are prone to affect stability and tradition in values of life. They put a severe strain on old concepts such as sacramental character of marriage. There is besides the march of science which decries emotion and faith as factors that affect right thinking and asks us to guide human existence solely by reason and logic. It has shown that the institutions of marriage and home may be necessary for other purposes but that they are not indispensable for preservation of human species as test tube babies may be produced in laboratories, and may be brought up in common homes (Soviet idea). Such environmental conditions could not leave any community without stamping their natural effects upon it.

VEDIC AND PURANIC PERIOD.

Going back to early Hindu law, *i.e.*, in the Vedic period we find the general rule that divorce is not approved and marriage is a lifelong union unbreakable by any human agency. The origin of marriage among Aryans in India as among other ancient peoples is a matter for the science of sociology. We find that at the commencement of Rig Vedic age marriage was a well-established institution and the Aryan ideal of marriage was very high[5]. In the Vedic period sacredness of marriage was emphasised and the family ideal was high and often realised[6]. Marriage, the most important of all samskaras, was highly thought of as an institution. We know of no stage in the Indian society when promiscuity was in practice, and there existed no institution of marriage. In Vedic literature there is no hint or suggestion about a society that had sex relations promiscuous and unregulated.[7]

Though there is a reference to some former period, when men lived a life devoid of any control, this was put to an end to by Shetaketu, son of Uddalaka of *Uttara Kuru*[8]. Since then mutual chastity between spouses was the rule, and any contravention of this principle was regarded as a great sin incurred. A reference in Mahabharata (Sabha Parva—31 pages 37-38) is found about unchaste standards in married life in the area of Mahishmati, but the reason for this licence is attributed to these people possessing extraordinary supernatural powers. These references seem to be more poetic than statements relating to actual facts. As regards divorce there is no reference to it in the Vedic texts, nor is there much discussion of the subject in post-Vedic literature. The theory of Dharmashastra-writers is that marriage when completed by Homa and Saptapadi is indissoluble.[9]

SMRITIS.

Smriti-writers like Manu say, "Let mutual fidelity (between husband and wife) continue till death; this in brief be understood to be the highest Dharma of man and wife.[10] The same writer further remarks, "Neither by sale nor by

5. Mandlik, 396, Mahabharat (Adi Parva Ch. 122).
6. Vedic Index, 1, 484, 485, C.H.I., 1, 89 Rig. Ved., x, 85.
7. Women in Vedic Age.
8. History of Hindu Dharma Shastras (Kane), Vol. II, Part I, p. 42, Mahabharat (Adi Parva : Ch. 113, p. 122).
9. Kane—History of Hindu Dharma Sastras, Vol. II, Part I, p. 619.
10. Manu IX, 101.

desertion is the wife released from the husband ; we understand that this is the law ordained by the Creator in former times."[11] Vishvarupa in his commentary on Yajnavalkya says, marriage is a Samskar, even if the husband or wife become Patita (debase); the Samskar does not end or become annulled by the later fact of adultery; she still remains a wife and consequently after purification no fresh marriage ceremony is needed. He says that even a total abandonment of wife by the husband or his entering into other marriages does not amount to divorce, *i.e.* (dissolution of the marital union), the marriage is still intact.[12]

Thus divorce in the ordinary sense of the word was unknown to Smritis and to Hindu society for about two thousand years except among the lower castes on the basis of custom recognised in their group.[13] Even a wife abandoned on account of her infidelity was entitled to a starving maintenance, as the marriage tie was supposed to remain intact in spite of her abandonment. Her maintenance was stopped only when she conceived as a result of adultery.[14]

According to Mitakshara a wife is not under the control of her husband as long as he remains *Patita* (debase) and she should wait till he makes penance and becomes pure, when he can again be restored to her.[15] Thus even a debased husband cannot be divorced. The Smritikaras (except for a few like Narada and Parasara) find no occasion where a wife could break the marriage tie for any reason whatsoever.

Kautilya[16] has also given expression to views similar to other commentators. Only the changed times appear to give colour of liberality to his opinions. He is agreed on the basic fact that marriages in the approved form cannot be dissolved. He adds, however, that though a wife hating her husband cannot be released from the husband if he be unwilling nor can the husband release himself from his wife if she is unwilling but if there be mutual hatred or aversion then a release is possible. He further states that in cases where there is danger of injury from one party to the other a release is possible. This means that the marriage entered in the Brahma, Arsha, Prajapatya and Daiva forms (the approved ones) it cannot be dissolved. But on the other hand if the marriage was entered in Gandharva, Asura or Rakshasa form it may be dissolved by mutual consent of the marrying partners in case where both hate each other. Only one-sided aversion is not a good ground to dissolve the marital union even in an unapproved form excepting in situations where danger or fear of injury exists. This distinction between marriages in approved and unapproved forms is Kautilya's own. It is not upheld by Courts or other authorities. Even modern writers like Mayne take the same view, *viz.*, that marriage in approved forms is indissoluble except by custom. Marriage in Hindu law is a holy union for the performance of religious duties.[17] It is not a contract entered into between parties but a sacrament performed by parents or guardians.[18] Though a husband is declared " owner of his wife ", he cannot dispose her of by gift or sale according to Yajnavalkya and other sages she being enumerated as one of the objects unfit to be given. Manu also says that a wife cannot be detached from her husband either by sale or by abandonment, implying naturally that the marital tie cannot be severed in any way, it being indissoluble by its very nature. It follows from the above that Hindu law does not recognise a divorce, meaning thereby the severance of a marriage already completed under the law.[19]

Sen throws further light on the peculiar nature of marital union amongst Hindus. He explains the position by saying that a Hindu family is peculiarly constituted and when a new member joins it by adoption or by marriage, he or

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11. Manu IX, 46.
12. Vishvarupa on Yajnavalkya, III, 253-254.
13. Kane—History of Hindu Dharma Shastras, II, Part I, 620.
14. Manu XI, 177 ; Narada, XII, 91 : Gautama XXII, 35 ; Yajna, I, 7.
15. Mitakshara on Yajnavalkya, I, 77.
16. Artha Shastra, III, 2. (300 B.C.).
17. *Sundarabai* v. *Shivnarayan*, (1908) 32 Bom. 81.
18. *Purushottam* v. *Purshottam*, (1897) I.L.R. 21 Bom 23, 30-31 ; *Atma Ram* v. *Barku Mal*, (1930) I.L.R. 11 Lah. 598 ; *Ratneshwari* v. *Bhagwati*, (1949) F.C.R. 715 : (1950) S.C.J. 514 ; *Moujilal* v. *Chandrabati*, (1911) I.L.R. 38 Cal. 700; *Venkatacharyula* · *Rangacharyalu*, (1891) I.L.R. 14 Mad. 316-18.
19. Sen; Hindu Jurisprudence, T.L.L. 283.

she becomes so deeply engrafted into the family frame that the idea of severance of the tie becomes an impossibility. So when a man marries, the wife brought into family becomes, as it were a limb of an organised whole and she could not cut herself off even in case of death of husband for she could live with the part of the family that was still alive and did not cease to exist due to the husband's death. Naturally therefore the question of dissolution of a Hindu marriage cannot arise.

Revolutionary Text of Parasara.

Surprising as it may appear we come across the following revolutionary text in Parasara.[20] 'नष्टे मृते, च संन्यस्ते क्लीबे च पतिते पतौ पञ्चस्वापत्सु नारीणां पतिरन्यो विधीयते'। (Another husband is ordained for women in five calamities, *viz.*, when the husband is lost, is dead, has become a sanyasin, is impotent or Patita.) It will be seen that this text embodies an idea which is wholly inconsistent with the general trend of Hindu thought. Some explanation has to be found for the view embodied in the above text.

The desire for a male offspring in particular was natural in all early societies, a male issue was prized both for the continuance of the family as well as for the performance of funeral rites. As it was essentially an agricultural group and believed in the theory of re-incarnation, it was no matter for surprise that the Hindu community attached special importance to possession of a male issue. He could be a helping hand in tilling the land, and according to their belief, could be of help in their achieving heaven. He could pay off the undischarged debts of a deceased father and thus release him from the torture of Put : hell. By certain rituals a son could help his deceased father attain peace hereafter. Such material and spiritual advantages were strong reasons for a Hindu's desire for male offspring. It is highly probable that these considerations were the root-cause of the Niyoga Pratha, *i.e.*, which in exceptional circumstances allowed a wife to have a son by a man other than her husband. Though it was neither a usual practice, nor was it encouraged or popularly liked, still it is a practice referred to in ancient texts and was resorted to in certain cases.[21]

May be that Niyoga was the doorway to the institution of divorce as such, or to remarriage of a Hindu woman in the life of her husband by nullifying the former marriage, in exceptional cases. But this text which has been the subject of everlasting controversy is not even interpreted to mean divorce by every commentator. Much controversy has raged around this verse. Some hold the view that this text is not meant for Kaliyuga. Others like Medhatithi explain it by having resort to technical rules of grammar that the word पतौ not being the correct plural of पति is used in the verse for guardian and not for पति. As an answer to this criticism it can be suggested that पतौ can mean पति also for the verse is composed by Rishis and it may be an आर्ष प्रयोग as Rishis are not always grammatically correct.

Somehow the Courts in British India did not agree with the interpretation of the text for allowing divorce in Hindu community. Neither do we find any evidence of the practice of divorce in the Hindu period known to historians. Nor is there during the Muslim period any trace of prevalence of such a practice. This was a time when it could easily be established due to the impact of the ideas of the ruling race. The Muslims recognised divorce as an important feature of their law of marriage.

There were reasons why British Courts did not accept divorce as a practice sanctioned by Hindu Law. Firstly, they only accepted Manu as the foremost

20. Parasara IV, 30.

21. Rig Veda, VII, 5, 8; Manu, V, 150-160 ; Vishnu, XXV, 17 ; Mahabharat the great epic of Hindus (author unknown) the whole story begins with Niyoga practice.

authority amongst various Smritikaras and Manu was against such a practice, secondly, even other text writers were not unanimous in dealing with the practice of divorce as lawful and permissible amongst Hindus; thirdly, because the social conditions refused to have any place for a proposition like divorce, and fourthly because no declarations by Pandits in the early British Courts supported it. Thus eventually Hindu Law was held not to allow divorce except where it was sanctioned by custom.

In our great Epic the Mahabharat episode of Nala and Damayanti is an illustration of the text quoted from Aparak. Here the husband had not been heard of for a considerable length of time and so Damayanti's father a ruler of high caste arranged for her remarriage, suitors came to be selected by her, but at the nick of the moment Nala turned up and so remarriage did not take place. This is clear evidence in favour of remarriage during husband's lifetime in ancient Indian period. Still it is a Pauranik Katha (Mythological theme) and is not dependable.

The digest compilers and other commentators are possibly correct in saying that the verse of Parasara and such practice is only for a former age not for today *i.e.* for Kaliyuga. Others have suggested that the word used in the text denotes 'guardian' and not 'husband' so it is a release from the guardian and not from the wedded spouse. According to Bannerjee this text relates either to a very primitive stage of Hindu community in which rapid multiplication was the main goal, or it is only evidence of a difference of opinion existing among the Hindu sages on a point on which unanimity of opinion can hardly be expected. As a matter of fact the idea of a second marriage of a Hindu woman is quite repugnant to Hindu social order.[22] Even permitting authorities do it with reluctance, for Narada says, that a twice married woman (known as Punarbhu) is not very different from a disloyal wife, and it is never for a virtuous woman to do so.[23]

Probably this text implies divorce, but the high moral standards in the community never gave a chance to people to depend upon the text authority and use it to obtain divorce. And consequently, a long period of disuse has given it a very dubious and unauthoritative status. No Courts or higher caste social groups are ever found to accept it as good law.

All writers and Judges and social decision makers unanimously refuse to accept practice of divorce in the Hindu community in upper classes, except on the basis of custom.[24]

Customary Divorce.

Among the lower castes it is neither infrequent nor unlawful to divorce a husband and marry another. This practice is based on custom. Amongst Sudras, re-marriage during a husband's life is not prohibited and is done by Pharkhati or Soda Chitti (releasing process).

These marriages are called Pat in Maharashtra, Natra in Gujarat and Udoki in Cannarese district. Sometimes even the caste group gets together to end the first marriage and allow the wife to re-marry. It is also known as Trin Tora in Northern India.[25]

Among aboriginal races and groups which had not come under Brahminical influence re-marriage does exist. Amongst Jats in Punjab a deserted woman is allowed to re-marry and get the status of a legal wife.[1] Same is true of Lingayats of South Kanara.[2]

Strange, an authority on customary practices in India also says that divorce by custom prevails and it is permitted in some places[3]. Keeping in view the

22. Banerjee, Hindu Law of Marriage and Stridhana, pp. 187-188.
23. Narada XII, 46-54.
24. *Jiva Magan* v. *Bai Jethi*, I.L.R. (1941) Bom. 434.
25. Steele, Law and Customs of Hindu castes, 26, 167-168.

1. Mayne, Hindu Law, Ch. IV.
2. Punjab Customary Law, II, 131, 74, 190, 192, 193, 195.
3. Strange, 1, 52.

prevalence of the practice among certain communities and relying upon writers on Hindu Law, Indian High Courts have recognised dissolution of marriage followed by re-marriage of both the spouses in certain communities. There are a number of cases where Judges have given effect to such a practice; though they always begin with the statement that divorce is an unkown incident of Hindu marriage but can be upheld in the recognised form on the basis of established custom. Judicial authorities in Calcutta, Bombay, Nagpur and N. W. P. have dealt with such cases and allowed dissolution.

In the N.W.P. Sadar Diwani Adalat in case of Must : *Emmertee* v. *Nirmal*[4] the Court declared that, " loss of caste by a Hindu husband cannot dissolve his marriage, or justify his wife's re-marriage or bar his claim over her person. A caste custom contrary to this cannot be pleaded unless proved to be corroborated by Shastras and it is the party preferring the plea who is to prove its existence". So it would appear that the Court did accept the practice of customary divorce.

In another case *Sheo Lal* v. *Kasi*[5], the same Court again declared that in Hindu Law there can be but one marriage unless there is justifiable cause to rescind the first one.

Bombay High Court has the longest list of decisions on divorce based on custom. In one case[6] the Court refused to accept a custom that permitted re-marriage amongst Gosavi community without getting a release from the first marriage with the first husband's consent. The Court was against this particular practice, *i.e.*, of re-marriage without putting an end to the previous marriage, but did not refuse to accept divorce as a custom. In another case[7] the Court refused to accept a custom of Pakhali community, which allowed divorce simply by payment of a sum of money fixed by the caste. The Court held such a custom to be immoral and improper and opposed to public policy within the meaning of section 23 of the Indian Contract Act as well as under Hindu Law, where no divorce is the general rule and allows it as a reluctant concession. In *Rahi* v. *Govind Valad Teja*[8] the same Court held that amongst Sudras re-marrige prevails and the sons of Punrbhu (re-marriage) by a duly contracted Pat marriage, *i.e.*, in accordance with the custom of the caste, are legitimate, and as to the right of inheritance and extent of shares, rank on par with the sons of ' lagna ' marriage (previous marriage). But Pat without divorce by the License named as Chor Chitti (released documents) is adulterous union ; divorce is essential for re-marriage. In *Khem Kore's case*[9], the Court dealt with a Brahmin couple, known as Sompura Brahmins doing the work of stone-cutters. The lower Court's finding was that the parties were Sompura Brahmins and had the practice of Natra (re-marriage) among them. But the High Court could not recognise the remarriage in this case as the wife had not taken the consent of her first husband to revoke the previous marriage and without this the second marriage was illegal. Still on the authority of texts maintenance was ordered giving the woman the status of a concubine to the second husband. In another case[10] the Court decided that in Pakhali caste of Ahmedabad a custom of divorce with mutual consent of the spouses is not repugnant to law in general or Hindu law in particular, and also referred to ' Tribes and Castes of Bombay' by R. E. Enthoven, Volume 1. In this case a distinction was clearly made between the custom where consent of the husband is taken in revoking the existing marriage before re-marriage and the custom where it is done without such consent. The latter was not recognised as valid and proper and was rejected by the Court as being invalid.

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4. N.W.P. (Digest), Sadar Dewani Adalat, p. 410 No. 67, June, 1864, p. 583.
5. N.W.P. (Digest) Sadar Dewani Adalt, 410, June. 8th, 1865.
6. *Bharathi* v. *Bharathi*, (1878) I.L.R. 2 Bom. 140.
7. *Keshya Mangovan* v. *Bai Gandhi* (*Minor*), *by her father*), (1915) I.L.R. 39 Bom. 538.
8. I.L.R. 1 Bom. 97.
9. *Khemkore* v. *Chunashankar Ranchor*, (1873) 10 Bom. M.C.Rep. 381.
10. *Pakhali Jiva Magan* v. *Bai Jethi*, 1941 Bom. 535.

In another case[11] the Court held that the caste punch (village headman) has no authority to grant Pharkati (release) by himself. The parties were Kumhars (Potters) and the husband was unheard of for more than seven years, and so in a Panchayat meeting the relatives of the wife obtained a release by paying a certain sum of money and later she entered into a marriage in Natra form. The High Court accepted the finding of the lower Court that such a custom in that group exists but held

" the principle stated in former cases refered to before (*Hargovan Gandhi* and *Reg.* v. *Shambhu Raghu*) was that the Court does not recognise the authority of the case to declare a marriage void and we shall stick to the same rule."

In another case divorce without the consent of the husband was declared ineffectual and re-marriage held illegal. Even though the lower Court had found that such a custom does exist in the Talpode Koli caste to which the parties belonged. The High Court refused to accept any such custom and observed that such a custom does not exist in Koli caste. It relied for its view on Strange : (3rd ed. 1859, p. 52) and declared that such a custom was against 'public morality.'[12]

In another case where the parties were again Koli by caste the same High Court decided that divorce and re-marriage are allowed when husband's consent has been taken. It further held that simply because a sum of money was accepted by the woman's father to pay it to the former husband to get release, the transaction shall not be deemed to be illegal.[13]

Probably the emphasis on the element of consent by the husband is due to early cases like *Dayaram*[14]. *Doolbh* v. *Bae Umba Bellasis*[11], where it was decisively said that in Lewa Koombhi caste, a woman cannot under any circumstances obtain a divorce from her husband without his consent.

Calcutta High Court also has taken a similar view. In *Kundomee Dasi's case*[15] the Court stated that " though Hindu Law does not contemplate divorce, still in those districts where it is recognised as an established custom it would have the force of law."

The plaintiff belonged to Assam and was a Hindu.

Madras High Court followed the precedent, and has in several cases upheld divorce on ground of custom. In *Chetti's case*[16] the Court observed that there was nothing immoral in a caste custom by which divorce and remarriage are permissible on mutual agreement. Nor would the payment by one party to the other of the expenses of the latter's original marriage render the transaction illegal. Parties were Potters by caste of Tinnevelly. The Court opined :

" We do not see that it is immoral, since it does not ignore marriage as a legal institution but provides a special mode by which it may be dissolved. The fact that there is a money payment does not make the custom immoral and among the inferior castes similar customs are known to prevail."[16]

The same Court held in another case[17] that mere desertion of his wife by a Sudra and their separation for several years is not sufficient to dissolve their marriage though it is true that divorce exists in certain circumstances in Vellas.

Again in a case[18], in Lingayat community of South Canara the re-marriage of a wife deserted by her husband was recognised as valid. Its legal and social name is Sarai Udiki (giving a cloth). This is valid but is different from Lagna or Dhara, the first marriage. In this case a number of witnesses gave evidence

11. *Emperor* v. *Bai Ganga*, (1917) I.L.R. 19 Bom. 56.
12. In re *Karsan Goja and Bai Rupa* (2 cases) Bom. M.C. Rep. 117-II.
13. *Hira* v. *Hansji Pema*, (1912) I.L.R. 37 Bom. 295.
14. 1 Morley Digest, 181.
15. *Kundomee Dasee and others* v. *Joteeram*, 3 Cal. (1878) 305.
16. *Shankarlingam Chetti* v. *Subban Chetti & others*, (1894) I.L.R. 17 Mad. 479.
17. *Pachan Pillai* v. *G. Gopalan Pillai*, 42 Mad. L.J. 276.
18. *Virsangappa* v. *Endrappa and others*, (1885) I.L.R. 8 Mad. 440.

and established Udiki as vaild either by quoting their personal example or their neighbours' cases, and their recognition by caste. Lingayats according to Bombay High Court are Sudras but actually it is only a sect which can be joined by any of the four castes. The Court held the children of *Udiki* to be as legitimate as that of Lagna or Dhara. This sect is spread over Mysore, Wynad, Ceded districts, in Coimbatore, and South Canara. The witnesses were quite important and authoritative as they were Gurus (teachers in religious field) and Mathadhisas (temple heads).

Nagpur High Court also has accepted divorce on the basis of custom as valid. In *Kodu* v. *Lola*[19], a Pat or Churi marriage was recognised as perfectly valid and divorce was upheld following the decision of Bombay High Court in *Mira* v. *Hemsji*. The only care taken and point emphasised by the Court was whether the previous marriage was validly dissolved or not; that not being the case it could not accept the latter marriage as valid. As early as 1852[20], we find a decision adopting the same line of reasoning. The learned Judge observed that it was not legal for a woman to make a Pat marriage without having previously obtained permission of her husband, unless he is dead; the children of such a marriage shall not inherit but shall be maintained in case a Soda Ghitti was not taken, *i.e.*, a deed of release was not obtained by the wife from her former husband. It is interesting to note that in a case[21], Nagpur High Court took the view that under Hind Law even if a divorce is permissible by custom, a divorce which is not by mutual agreement but is unilateral and against the wishes of the divorced party is not valid.

These cases show that divorce by custom has long been permitted in certain groups among Hindus. But unfortunately no detalis are available, firstly, because customary divorce prevails only in the lower stratum of society which is very poor; and either for financial reasons or due to their less developed legal sense, they hardly ever take a divorce case to a regular Court of law. The village Panchayat is their Court, and so there are very few reported cases available on the subject. Secondly in all these decisions only a verdict of guilty or not guilty is pronounced and there is no examination of details. Thus we have no clear picture but just an assertion that divorce did exist. We have no knowledge of procedural details *e.g.*, How a divorce was given, or on what grounds? Whether any provision was made for the children of the previous marriage—their custody, maintenance, etc.?

Generally speaking we can deduce the following points from the material that is available :

1. Divorce as a general rule was not permitted in Hindu society.

2. Divorce by custom was allowed among the lower castes generally and even among some higher castes, *e.g.*, among Sompura Brahmins.

3. As a basic principle the former husband's consent was necessary to dissolve the marriage; without such consent the re-marriage of a woman was invalid.

4. Desertion was accepted as a good ground for divorce among certain groups but not in others.

5. The village or the caste Panchayat was not given the authority to dissolve a marriage on its own without the husbands' consent.

6. Divorce was generally recognised in the lower community group. This view was taken solely upon the authority of Steel's Hindu Law.

Manek in his Handbook of Hidu Law (8th ed., p. 40) states that among the lower castes of Hindus a marriage could be dissolved on the following grounds :

19. *Kodu* v. *Lola*, I.L.R. (1947) Nag. 885.
20. West & Buhler, Vol. I, 92.
21. *Sitaram Ranoo* v. *Demai Jaya*, I.L.R. (1948) Nag. 851.

1. Husband being impotent.
2. Continuous quarrel.
3. By mutual consent.
4. Irregularity in performance of the marriage.
5. Husband's long and continued absence and want of knowledge that he is alive.

Manek, however, does not support his statement by any authoritative references.

LESGISLATIVE PERIOD OR PRESENT-DAY POSITION.

As mentioned earlier some States in India had introduced divorce by legislation even before 1955. In that year divorce was made permissible for all castes of Hindus by a Parliamentary enactment.

Baroda was the first Indian State to introduce divorce in Hindu Law by legislation in 1931. About two decades later it was followed by Bombay. It was not long before Madras legalised divorce for Hindus of all castes in 1949. Saurashtra passed its Hindu Divorce Act in 1952. In 1954 the Union Legislature legalised divorce for all Indian citizens if the marriage was registered under the Special Marriage Act. Thus divorce was indirectly introduced in Hindu marriage. Finally in 1955 our Parliament put an end to the age old concept of Hindu marriage as a lifelong union. Hindu Marriage Act, 1955, allowed the right of divorce to Hindus of all castes, sect and sub-sects. The enactment is to have retrospective effect and applies even to marriages performed before the Act came into force.

Generally speaking all these enactments provide similar grounds for divorce, *viz.*, desertion, cruelty, being unheard of for a long time, suffering from some loathsome or veneral disease, conviction for a criminal offence of a serious nature and impotency. None of these enactments however accepts barrenness of the wife or mere incompatibility of temper as good grounds for divorce.

Our Special Marriage Act however stands apart as a piece of matrimonial legislation. Among other grounds if permits divorce by mutual consent. The provision creates a somewhat anomalous situation. On the one hand collusion of parties is a bar for the grant of a decree for divorce and at the same time mutual. consent is considered a good ground for obtaining a divorce.

One may well pause and inquire whether are we drifting ? In our anxiety to emancipate woman from the thraldom of man and provide relief for parties to ill assorted marriages which the parties might find inconvenient, by providing facilities for easy divorce, we have gone even beyond Reno (Nevada U.S.A.) which has earned an 'unenviable' reputation in this connection throughout the States of America.

To recapitulate, there are three stages through which we may trace the divorce law of Hindus. First, during the Vedic period where we do not find even the germ of the idea of divorce. Secondly, the Smriti period, here the idea of divorce is put forward by Narada and Parasara though not without considerable hestiation, and thirdly the modern period which for the present purpose may be taken to have commenced only in the second quarter of the present century. Here with our theories of individual liberty in every sphere of life, equality of sexes and emancipation of women we have discovered in divorce a remedy for the ills of inconvenient and ill assorted marriage. We have effected a complete break with the past Our recent legislation on the subject, is not only in total disregard of Shastric injunctions but is wholly inconsistent with our ancient tradition. It is doubtful if it is compatible with the spirit of true Aryan culture.

To say so is not to disregard the existence of the practice of divorce among what are called the lower castes in Hindu community When we talk of the Vedas and Smritis we refer to what is regarded as the repository of wisdom of an anceint people acquired through ages, something that represents Aryan culture as evolved by the Indian branch of the race at its highest. The so called lower castes though they

comprise a large section of Hindu community do not represent the Indian culture, nor could a practice prevailing among that section be taken to represent the ideal of the Indian nation. Marriage as an indissoluble union where there is no room for any such thing as divorce, was a pattern evolved by the community. Nor was it a mere distant ideal. It had become part of the mental make-up of the nation and was followed in actual life.

Our recent law of divorce is not the result of a process of evolution or natural development in a progressive society, it is an exotic plant engrafted on our legal system by the reformist zeal of our legislative crusaders who are out to create a brave new world by just enacting laws. It is too early to judge the effect of this legislation on our social life. It will however be interesting to watch how far advantage is taken of the recent legislation by the community and how in years to come our social structure is affected by it.

SRI G. R. JAGADISAN

Judge-designate of the Madras High Court.

The announcement of the appointment of Sri G. R. Jagadisan, a senior member of the Madras Bar, as a permanent Judge of the Madras High Court will be welcomed by one and all. Recognition of merit does come, sooner or later—and the talk of Sri Jagadisan being tipped for Judgeship has been current in recent times. It is neither necessary, nor is this the occasion to introduce Sri Jagadisan to the members of the Madras Bar. He has been such an active, close and familiar associate among the members of the Bar till this day that he will probably be still known familiarly by his initials 'G.R.'

Hailing from Tanjore District Sri Jagadisan graduated from the St. Joseph's College at Tiruchirapalli and took his Law Degree from the Madras Law College. He had his Apprenticeship under Sri K. S. Krishnaswami Iyengar, who became a Judge of the Madras High Court. He worked with Sri A. V. Viswanatha Sastri, who also adorned the Bench of the Madras High Court and later served as an Additional Judge of the Andhra High Court. He was closely associated in his work with Sri T. L. Venkatarama Iyer who also became a Judge of the Madras High Court and then a Judge of the Supreme Court of India and who is now steering the work of the Law Commission.

Sri Jagadisan rose to the forefront of the Bar by hard and intensive work for over several years. His is not one of those lucky starts which leads on to sudden fame and fortune. He had to go through the gruelling tests of waiting, studying, and training and has grown to be an able Advocate. His work was steady and good and he has appeared, in recent years, in many important cases in the High Court and the Supreme Court as will be borne out by the Law Reports.

Of a rather reserved temperament, suave in manners, slow and steady in his voice, his advocacy has always been marked by its logic and analysis, more than anything else. With his training and experience in the background of the fine traditions of the Madras Bar of which he was a member all these years, we are sure Sri Jagadisan will be a popular and able Judge.

We offer him our hearty felicitations on his elevation to the Bench.

THE MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT, 1959

Some New Features

By

P. N. CHANDRASEKHARA IYER, M.A., B.L., *Advocate, Tanjore.*

This enactment having received the assent of the President on the 19th November, 1959, has become law (Madras Act No. XXII of 1959) and the prior enactment Act XIX of 1951 stands repealed. In the Statement of Objects and Reasons for the new enactment it was stated that the new enactment was necessitated by two reasons, *viz.*, revision of certain provisions consequent on the decisions of the High Court and Supreme Court, and removal of difficulties experienced in the working of the Act. The first object may now be deemed to have been accomplished, in as much as the intendment of the decisions appear to have been given effect to. As regards the second object, if the changes introduced in the original Bill in respect of certain provisions are an indication of the difficulties, it is doubtful if the intended object is now achieved, for, many such changes have not only been not accepted in the new Act, but the legislation even indicates a change in the contrary direction in such provisions. In this context, the position of the Area Committee comes to one's mind. But it is not the object of this article to enter into controversial fields, but it is merely to indicate the more important of the new features in the present enactment.

New Bodies.—Three new bodies are proposed to be set up under the Act. One of them is called the *Advisory Committee.* It is to consist of the Minister in charge, the Departmental Secretary to Government, the Commissioner and twelve non-officials, and its functions are to make recommendations to Government in respect of prescribed matters and to advise the Government on matters referred to it (section 7). Another new body mentioned is the "*Consultative Committee* and Sub-Committee." It is constituted by the Government or a subordinate authority specially authorised. Further particulars of this body are not available, and from the provision that the Act must be deemed to have come into force even from 28th November, 1958, in respect of expenses incurred by that Committee, it has to be inferred that the said body has already been constituted from 28th November, 1958 (section 92 (4) and section 1 (4)). The third new body is the *Tribunal* (section 83.) The qualifications for appointment to the Tribunal and the conditions of service have to be prescribed but the number of members shall not exceed three. The function of the Tribunal is to make award in respect of the amount of compensation due to any lessee, licensee or mortgagee of any land or building belonging to a religious institution whose contract is compulsorily terminated and who is dispossessed in consequence. The Government is authorised to constitute as many tribunals as may be necessary for the purposes of the Act.

Encroachments on properties of institutions (Chapter VII).—New powers have been taken in the Act for prevention of encroachments on the properties of religious institutions, and for preserving their artistic appearance and religious atmosphere. Trustees are prohibited from leasing, mortgaging with possession, or granting license of appurtenent properties, *i.e.*, those adjoining the institutions whether inside or outside, such as land, tank, well, prakarams, matams, courtyards, corridors, etc., except it be for purpose of providing amenities to pilgrims, or vending flowers or other articles used for worship, or of holding for specified periods fairs or exhibitions during festivals. If in the opinion of the Assistant Commissioner there has been an encroachment on such appurtenant property, he shall report to the Deputy Commissioner, and if the Deputy Commissioner after due notice and enquiry decides that an encroacment is made, he shall order removal, and the Assistant Commissioner may take possession with police help if necessary. An appeal to the Commissioner is provided for. But the alleged encroacher can file a suit in the Civil Court that the religious institution has no title to the concerned property (Section 79.)

The Deputy Commissioner, on a report from the Assistant Commissioner, if satisfied that any action taken by a lessee, licensee or mortgagee of such appurtenant property has marred or is likely to mar the artistic appearance or religious atmosphere of the religious institution, may after due notice and enquiry terminate the lease or license or cancel the mortgage and may require the lessee, licensee or mortgagee to deliver possession to the trustee. Provision is made for an appeal to the Commissioner against the order of the Deputy Commissioner. Such decision is final and conclusive on the question that the artistic appearance or religious atmosphere is marred, and the Assistant Commissioner shall take possession with police help if necessary, and the trustee shall forthwith restore the artistic appearance or religious atmosphere. The lessee, licensee or mortgagee is entitled to compensation, to be determined by the Tribunal constituted for the purpose, and in any case the amount of compensation shall not exceed the amount payable by the lessee or licensee for the unexpired term of the lease or licence, and in case of mortgage the balance due under the mortgage. The aggrieved party may file a suit in the Civil Court against the award. Officers of the Department and other persons acting in pursuance of these provisions are protected from legal proceedings for such action taken by them and for any damage caused or likely to be caused from such action.

Authorities under the Act.—Special qualifications are prescribed for the various authorities exercising functions under the Act. The post of *Commissioner* shall be held by a member of the State higher judicial service, and the post of *Deputy Commissioner* shall be held by a member of the Madras judicial service and the said posts may also be held by a member of any other service, or may be filled by direct recruitment, but if the Commissioner's post is not held by a member of the judicial service, at least one of the posts of Deputy Commissioner shall be held by a member of the judicial service (section 9). A number of qualifications are enumerated for eligibility for appointment to the Area Committee. He should profess the Hindu religion, his age should be between twenty-five and seventy, he should not be an undischarged insolvent. He should not have been sentenced by a criminal Court for an offence involving moral delinquency. He should not be a trustee, office-bearer, or servant of a religious institution subject to the Area Committee nor should he be interested in a subsisting lease or contract or paid legal practitioner of such institution (section 16). Similar qualifications are prescribed for trustees (section 26).

The *Assistant Commissioner* is now reduced from his position of Chairman to that of Secretary of the Area Committee (section 17), and in making appointments to the Area Committee, the Government will appoint one amongst them as Chairman. The Secretary will have right to take part in the discussions of the Committee but he has no right of vote. But he can send up to the Commissioner his own views in respect of any item of the proceedings of the Area Committee and to suggest such action as he may consider necessary. The Area Committee is now given power not merely to appoint non-hereditary trustees for religious institutions not comprised in the Commissioner's list, but also to suspend, remove, or dismiss such trustees for specified reasons, thus removing an anomaly in the old Act. But now some special powers are given to the Assistant Commissioner. Under the old Act (section 98) in cases of emergency the Assistant Commissioner was empowered to direct the doing of any act, which should ordinarily be done by the Area Committee, provided it was not a matter prohibited by the Area Committee, and the Area Committee could annul, modify or reverse the same at its next meeting. But under the new Act (section 113) the Assistant Commissioner may do or direct the doing of any act not only in cases of emergency, but also, where he is satisfied that the Area Committee has failed or omitted to discharge any of its duties or to perform any of its functions and the only restriction is that the action should not be inconsistent with the provisions of this Act ; he has only to report to the Commissioner. These clumsy provisions may be the result of a compromise between the original provisions in the Bill and the views of the Select Committee.

Executive Officer.—The term "Executive Officer" has for the first time been defined in this Act as a person appointed to exercise such powers and discharge such duties appertaining to the administration of a religious institution, as are assigned to him under the Act or Rules or Scheme. In this Act, for the first time a provision is made for his appointment directly (section 45). Under the 1951 Act, an Executive officer could be appointed to a religious institution only under the guise or device of framing a scheme for the better administration thereof. But under the new Act, the Commissioner may appoint subject to such conditions as may be prescribed, an executive officer for any religious institution (other than Math) and define his powers and duties ; and may for good and sufficient cause suspend or remove or dismiss the Executive Officer. Consequent on this provision, the provision in the Scheme section providing a clause for the appointment of a paid Executive Officer has been deleted.

Hereditary trustees.—Hereditary trustees have acquired one or two additional rights. In cases where additional (non-hereditary) trustees are appointed for religious institutions having a hereditary trustee the hereditary trustee alone shall be the Chairman of the Board of trustees, and if there is more than one hereditary trustee, one of such hereditary trustees alone shall be elected or nominated to be its Chairman. In respect of non-listed temples, while the power to punish non-hereditary trustees is now vested with the Area Committee, in respect of hereditary trustees, such power can be exercised only by the Deputy Commissioner and there is a right of appeal to the Commissioner. In respect of listed institutions the power to punish hereditary trustees is vested with the Commissioner and there is a right of appeal to the Government. The hereditary trustee who is aggrieved by an order of the Commissioner or the Government as above is now given a right to institute a suit in the Court against such order.

Maths.—The rights now preserved to heads of maths (and of specific endowments attached thereto) may now be taken to have come up to the legal requirements, as laid down in the decisions of the High Court and the Supreme Court impugning certain provisions of the earlier Act as *ultra vires*. At the same time, it may be noted that the suggestion of the High Court to enact or classify separately the provisions relating to maths to avoid confusions and conflict has not been followed, so that the special provisions regarding heads of maths are again strewn about in the Act. Maths have been excluded from the wide and general powers of the Commissioner to call for records of proceedings with a view to examine the regularity, correctness or propriety of any decision or order of a trustee, and to pass appropriate orders, but the Commissioner has power to interfere to examine the legality of a decision or order of the head of a math (section 21). In the exercise of the right of officers to enter religious institutions very stringent safeguards are introduced. They should have due regard to the religious practice or usage of institution, and if such a usage prohibits entry into the *sanctum sanctorum* or *pooja griha* or any other portion held specially sacred within the premises of the institution, they are bound to conform to it and if a difference of opinion or dispute arises on this matter, the question has to be referred to the Commissioner for decision, and a further appeal to the Government against the orders of the Commissioner, at the instance of the aggrieved party is also provided. The said officers are bound to observe forms and ceremonies appropriate to the institution, and in their dealings with the head of the math have to act in conformity with the usages of the Math (sections 24, 25). In the matter of incurring expenditure for arrangements to secure the health, safety or convenience of disciples, pilgrims or worshippers, and for the training of archakas, the trustee of a math is not fettered now by any instructions of the Commissioner (section 35) and he may now utilise the surplus income from the endowments after meeting the prescribed expenses, in such manner as he deems fit (section 36) and he is entitled to spend the *Pathakanikkai* at his own discretion in accordance with the custom and usages of the institution (section 62). Maths are exempted from the notification proceedings of Chapter VI. Furthermore there is now no power vested in any authority to appoint a salaried Executive Officer for a math either directly (section 45) or under the guise of a scheme (section 65) and the Commissioner has power to

modify existing schemes in such manner as may be necessary to bring it into conformity with the provisions of this Act.

Trustees.—They have lost ground on some points, notably two. The power of the trustee to utilise surplus funds of the institution continues to be subject to restrictions and conditions and the sanction of the Commissioner has to be obtained therefor. Under the old Act, a right of suit was given to the trustee or any person having interest, to set aside the order of the Commissioner and against the decision of the Court, a further right of appeal to the High Court was also conferred. Under the new Act, the right of suit is taken away and in its stead only an appeal to the Government against the decision of the Commission is provided. Under the old Act, there was only one mode of surcharging trustees for loss caused by neglect or misconduct or illegality or irregularity and that was at the time of the consideration of the audit report. Now under the present Act, an additional and speedier mode for surcharge is provided (section 33). If in the course of inspection by the Commissioner, or subordinate authority, of the records accounts, etc., of a religious institution, it appears that the trustee or any officer or servant working under him has misappropriated, or incurred illegal or improper expenditure, the Commissioner may after due enquiry, certify the amount so lost and initiate surcharge proceedings as laid down in the Act.

Utilisation of Temple funds.—The disbursement and utilisation of temple funds by trustees for the various purposes in their order of importance are now clearly defined. First come the budgeted purposes, *i.e.*, maintenance of the objects of the institution and the performance of the services, discharge of loans, repair, and renovation of temple buildings, contribution to Reserve fund, and maintenance of working balance. Next comes the expenditure which may be incurred on arrangements for securing the health, safety and convenience of pilgrims and the worshippers resorting to the institution, and for the training of *archakas*, *adyapakas*, *vedaparayanikas* and *othuvars*, in accordance with the general or special direction of the Commissioner or Area Committee as the case may be. Thereafter the surplus may be appropriated with the sanction of the Commissioner to all or any of the undermentioned purposes, preference being given to the first seven: *viz.*, aid to poor institutions : aid to Hindu religious purposes ; propagation of the religious tenets of the institution ; recitation of *Divya Prabandams* and *Thevarams* ; schools for training *archakas*, *othuvars*, etc., college or university in which the main feature is study of Hindu religion, philosophy, sastras and Hindu temple architecture ; educational institutions in which instructions in Hindu religion is also imparted ; promotion of fine arts and architecture ; orphanages for Hindu religion ; asylums for lepers, poor homes for destitutes and disabled persons and hospitals for pilgrims. But where the religious institution is founded and maintained by a religious denomination or any section thereof the endowments shall as far as possible be utilised for the benefits of the denomination or section concerned for the above-mentioned purposes.

Funds.—The necessary provisions for legalising the funds of the Administration have now been enacted (section 12, section 92). All the officers of the Department inclusive of the servants and Executive Officers are now deemed servants of the Government, and their salaries and pensions and the charges and expenses incurred by the Area Committees and the costs of audit are to be paid in the first instance out of the Consolidated Funds of the State. The Commissioner shall collect from all religious institutions, contributions, at a rate not exceeding seven per cent. of its income annually. He shall also collect from all temples (except temples with less than an annual income of Rs. 1,000) a further sum not exceeding one and a half per cent. per annum for meeting the cost of auditing. These collections shall be credited to a fund called the Madras Hindu Religious and Charitable Endowments Administration Fund which shall vest in the Commissioner. To this fund may also be credited grants or loans from Government or grants from private persons. Further the Commissioner shall recover from the religious institution, the salaries, allowances and pensions of Executive Officers and credit this amount also to the said fund. Out

of the said fund, the Commissioner shall repay to the Government all the sums paid by the Government from the Consolidated Fund, and also repay the loans due to the Government.

Common-Good Fund.—A new fund called the common good fund (section 97) created under the Act has been made necessary due to an impugned sub-section (section 76 (5)) of the 1951 Act. Their Lordships of the High Court while discussing the constitutional validity for the levy of contributions, in the *Puttigi Mutt case*[1], stressed again the difference between a tax and a fee. Their attention was drawn to the progressive increase made by the legislature in the various amending Acts in the rate of contribution from one and half per cent. to five per cent. of the income and their Lordships held that in order to make the contribution legal, a real correlation is to be maintained at all times between the fee actually levied and the services rendered, and that the rates should be kept as near as possible to the real *quid pro quo* basis for the same, and that therefore when section 76 (5) of the 1951 Act provided for a surplus fund out of the contribution levied, the levy became illegal to that extent and therefore their Lordships struck down that sub-section. It has to be assumed that when the maximum rate for the contribution has in the present Act been further increased to 7 per cent. the legislature must have kept these *quid pro quo* principles in view. Whatever that may be, this new fund, the common good fund has been created for the purposes for which the fund under the impugned sub-section (5) of section 76 of the 1951 Act was sought to be utilised. This fund also vests in the Commissioner and is to be administered by him. It is to be created out of voluntary contributions made by private persons, or by trustees of reigious institutions out of their surplus. But voluntary contribution to this fund is not one of the objects for which the surplus could be utilised by the trustees of temples under the Act. The provision can apply, if at all, only to trustees of maths who are now given the right to utilise the surplus in such manner as they deem fit. This common good fund has been created for the renovation and preservation of needy temples and their paintings and for the promotion and propagation of tenets common to all or any class of religious institutions.

There are many other minor amendments, too minute and too numerous, to be mentioned here. Further the Rules to be framed under the Act are yet to come and it is well known that in modern Indian legislation, Rules play as important a part (if not a more important one) than the enactment itself. That the Government has been taking more and more powers in this field whenever one enactment replaces another has often been commented upon. One instance of this feature, in the present enactment is the power taken by Government (section 4) to exempt any religious institution from the operation of any of the provisions of this Act or the Rules and to vary or cancel such exemption.

[END OF VOLUME (1959) 2 M.L.J. JOURNAL.]

1. (1956) 1 M.L.J. 532.